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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 803

DALLAS SELLS and
COMMITTEE ON POLITICAL EDUCATION,
Appellants,

v.

MATTHEW WELSH, as Governor of the State of Indiana and as a Member of the Indiana Revenue Board,
JAMES C. COURTNEY, as Revenue Commissioner of the State of Indiana,
EDWIN K. STEERS, as Attorney General of the State of Indiana,
ROBERT HUGHES, Treasurer of The State of Indiana, and
DOROTHY GARDNER, Auditor of The State of Indiana, as Members of the Indiana Revenue Board, and
INDIANA DEPARTMENT OF STATE REVENUE,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF INDIANA

APPELLANTS' BRIEF IN REPLY TO APPELLEES' MOTION TO DISMISS

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Pursuant to Rule 16(3) of this Court, Appellants in the above entitled cause file this brief in opposition to the Motion to Dismiss of Appellees Matthew Welsh and James C. Courtney (hereinafter called "Motion").

STATEMENT

In the motion, it is said the federal claims, presented in questions 1 and 2 of our Jurisdictional Statement, are not substantial for the following reasons: (a) Certain underlying substantive questions, evaded by the Supreme Court of Indiana in refusing to consider evidence of the passage of the Indiana Acts of 1963 (Spec. Sess.), ch. 30, Sec. 1 through 25 (Jurisdictional Statement, App. D; hereinafter called "the Act" or "House Enrolled Act No. 1226"), "involve purely the construction of the Constitution of Indiana" (Motion, p. 3); (b) Judicial refusal to consider evidence of passage of House Enrolled Act No. 1226 does not offend the 14th Amendment because such refusal is "so firmly established and widely observed" (Motion, p. 5).

The Motion asserts further that question 3 is not substantial, since (a) Sec. 4(b)(1) of the Act, exempting certain sales to farmers, is a reasonable classification because the Supreme Court of Indiana construed it as exempting wholesale sales only (Motion, p. 7), and (b) this Court is bound by that Court's construction (Motion, p. 8).

These contentions will be discussed in substantially the preceding order under the heading "Argument" herein.

ARGUMENT

I.

Taking of Property, pursuant to a taxation statute, not passed into law, is a denial of due process of law.

Appellants sought to have the Supreme Court of Indiana determine the substantive question presented by question 2 of this appeal:

> Whether passage of the Act, without the vote of a majority of all members elected to both houses of the Indiana General Assembly, as required by Article 4, Section 25, Constitution of Indiana, deprives Appellants of their property without due process of law, under the Constitution of the United States, Amendment 14, Section 1? (Jurisdictional Statement, p. 4)

In an attempt to belittle the merit of this question, Appellees now offer two different so-called underlying substantive questions (Motion, pps. 2, 3).

First, it is implied that the Act was originally passed by a majority of members elect in the Senate, subsequently amended, and such amended Act was approved by simple majority concurrence, which complies with the requirement of passage by a constitutional majority.

The evidence of passage shows, however, that the Act was not an amendment of a prior bill passed by a constitutional majority. It was a completely new bill when approved by so-called simple majority concurrence. Specifically, the Senate Journal shows: (a) that a bill, entitled, "A bill for an Act to Amend the Gross Income Tax Act of 1933 in relation to the classifications of theaters for taxing purposes," passed the Indiana Senate by a vote

of 28 to 21, on March 25, 1963 (Journal of the Senate, 1963 Spec. Sess., pps. 237, 238); (b) that, on April 18, 1963, every word in the bill, passed March 25, 1963, was struck out, following the enacting clause; that the Act in question, consisting of 25 new sections was substituted therefor, and that this Act was purportedly passed by 24 elected members of the Senate, plus the Lieutenant Governor (Journal of the Senate, 1963 Spec. Sess., pps. 651-719).

Second, Appellees imply that a constitutional majority may not have been required for passage of the Act, since Article 5, Sec. 21, Indiana Constitution, provides:

> ". . . whenever the Senate shall be equally divided he (the Lieutenant Governor) shall give the casting vote."

However, all this language means is that the Lieutenant Governor shall cast[1] a vote in case of a tie. It is significant that, if the Lieutenant Governor's vote is counted as a vote of a member elect, there still were not 26 votes for the Act—the required constitutional majority.

Clearly Article 5, Section 21 does not abolish the requirement of passage by a constitutional majority (Article 4, Sec. 25, Indiana Constitution) whenever the Lieutenant Governor votes for a bill in case of a tie. If that were so, a bill could become a law by a mere vote of 2 to 1 in the situation where the Lieutenant Governor voted for the bill, breaking a one, one tie. No such absurdity was intended by the framers of the Indiana Constitution of 1851.[2]

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1. Webster's New Collegiate Dictionary defines "cast" to mean: "to give (a vote)".

2. Thus, Mr. Read, a delegate to the Constitutional Convention of 1850, said:

> "If there had been a single reform principle introduced into the lately made constitutions, this of requiring a majority of all members to pass a

The fact that this Act was not passed by a majority of all members elected to the Indiana Senate remains. If the Supreme Court of Indiana had looked at this fact, it would have been compelled to state, as it stated in *McCulloch v. State* (1859) 11 Ind. 424, 435 that:

> "... where the journals, on their face, show that a bill on its passage did not receive, in its favor, a majority of all members elected, as prescribed by the constitution, the whole legislative proceeding would be a nullity; because, if the requisite number do not vote in the affirmative upon final passage, there is a defect of power, and no bill so passed can ever have the force of the law."

Accordingly, where a bill had not received the requisite votes, that Court held the bill invalid in *Cordell v. State* (1864) 22 Ind. 1.

Other state courts have held laws invalid where the facts of passage show the bill failed to pass. See 50 Am. Jur. Statutes, Sec. 84, pps. 95, 96. However, without reversing *McCulloch* or *Cordell*, the Supreme Court of Indiana has refused to look at the evidence of passage since 1869 (*Evans, Auditor v. Browne* (1869), 30 Ind. 514), even where, as here, the journals show the bill failed to pass. Thus, judicial restraint can make a bill valid in spite of the fact that it never was passed into law.

Notwithstanding the doctrine of judicial restraint, the due process clause of the 14th Amendment refers to and includes the law of the land in each state (see Jurisdictional

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law, is one of the most valuable in preventing irresponsible legislation. When the ayes and noes are required to be entered upon the journals for passage of every bill, and when a majority of all members must give and assent thereto before it becomes a law, there will be safe and careful legislation." (Debates in Indiana Convention 1850, Vol. 2, Page 1085).

Statement, pps. 15-17). That law requires that the people consent to be taxed, in a prescribed manner (Article 4, Sec. 25, Constitution of Indiana), before the state has power to levy a particular tax. The right to have laws passed with the consent of the governed is so basic that it is "implicit in the concept of ordered liberty." *Palko v. Connecticut* (1937), 302 U. S. 319, 325. It, in fact, is the most basic right of the people in a free society.

Moreover, the principle stated in *Miller Bros. Co. v. Maryland* (1954), 347 U. S. 341, 342 is applicable to the case at hand:

> "It is a venerable if trite observation that seizure of property by the State under pretext of taxation when there is no jurisdiction or power to tax is simple confiscation and a denial of due process of law."

Here the state is seizing property under pretext of taxation because the executive has not been granted the state's inherent power to tax by a duly enacted law. This does not differ in principle from the *Miller* case where the executive forced out-of-state vendors to collect and remit a use tax in a place where the executive had no power to tax.

Clearly question 2 presents a substantial federal claim, under the due process clause, 14th Amendment. It does not involve "purely the construction of the Constitution of Indiana."

II.

Judicial refusal to consider evidence, concerning passage of a purported law, when laws are required to be passed by a constitutional majority, is a denial of due process of law.

The Supreme Court of Indiana evaded a decision on the merits of question 2 by using the so-called doctrine of judicial restraint. In essence such doctrine says: ". . . the proper authentication of an enrolled Act is proof of its proper enactment, with the exception of fraud. . . ." (Jurisdictional Statement, App. A, p. x.) Appellees urge that: "It is inconceivable that in following a rule of judicial restraint so firmly established and widely observed, the Supreme Court of Indiana offended the requirements of the 14th Amendment" (Motion, p. 5).

Appellees citations show, however, that judicial restraint is neither "firmly established" nor "widely observed". For example, in 82 CJS Statutes, Sec. 83, p. 136 (cited in Motion, p. 5) it is said:

> "In England, where there is no written constitution and parliament is supreme, an enrolled statute is conclusive evidence of its passage and validity. . . . In the United States . . . there is a strong conflict of opinion as to whether an Act so enrolled is conclusive evidence as to the correctness of its contents and as to its passage in the mode prescribed by law."

Again, *Marshall Field & Co. v. Clark* (1892) 143 U. S. 649 is cited by Appellees (Motion, p. 5) to show that this Court observes the judicial restraint doctrine in respect to Acts of Congress. An examination of that opinion indicates, however, that such observance is based upon the lack of Federal Constitutional limitations, comparable to

Article 4, Sec. 25, Indiana Constitution, with respect to the enactment process. Thus, at pps. 677, 678 of 143 U. S., noting that contrary state decisions "rested upon constitutional . . . provisions . . . which . . . required or authorized the Court to go behind the enrolled Act", this Court quoted the following, from *People v. Barnes*, 35 Ill. 121, with approval:

> "Were it not for the somewhat peculiar provision of our constitution, which requires that all bills before they can become laws shall be read three several times in each house, *and shall be passed by a vote of a majority of all members elect*, a bill thus signed and approved would be conclusive of its validity and binding force as a law. . . . " (Emphasis ours)

Any semblance of observance disappears when a federal constitutional limitation, similar to Article 4, Sec. 25, Indiana Constitution, is present. In *United States v. Ballin* (1891) 144 U. S. 1, for instance, this Court did not exercise judicial restraint to evade a decision on the merits The House Journal was examined to determine whether a quorum was present for passage of a bill, as required by Article I, Sec. 5, Constitution of the United States. At p. 6 of 144 U. S., this Court stated:

> "As appears from the journal, at the time this bill was passed in the house there was present a majority, a quorum, and the house was authorized to transact any and all business. . . . the question is, whether, a quorum being present, the bill received a sufficient number of votes; and here the general rule of all parliamentary bodies is that, when a quorum is present, the act of a majority of the quorum is the act of the body. This has been the rule for all time, except so far as in any given case

> the terms of the organic act under which the body is assembled have prescribed specific limitations. As, for instance, *in those States where the constitution provides a majority of all members elected to either house shall be necessary for passage of any bill.* No such limitation is found in the Federal Constitution, and therefore the general law of such bodies obtains." (Emphasis added)

But such a limitation is found in the Constitution of Indiana, Article 4, Sec. 25.

Appellees cite *Baker v. Carr* (1962), 369 U. S. 186 (Motion, p. 5) to show the continuing validity of the rule of restraint in this Court. At pps. 514-515, 369 U. S., referring to the *Marshall Field case*, supra, this Court remarked:

> "But it is not true that courts will never delve into a legislator's records upon such a quest (whether a bill, as passed, complied with all requisite formalities); If the enrolled statute lacks an effective date, a court will not hesitate to seek it in the legislative journals. . . ."

Indeed *Baker v. Carr* stands for the principle that this Court will no longer evade a decision on the merits, under the doctrine of judicial restraint, where the legislature has violated a specific constitutional right. Thus, Mr. Justice Douglas, at p. 249 of 369 U. S., concurring, wrote:

> "It is ludicrous to preclude judicial relief when a mainspring of representative government is impaired. Legislators have no immunity from the constitution. The legislatures of our land should be made as responsive to the Constitution of the United States as are the citizens who elect the legislators."

For similar reasons, many courts have rejected the rule of restraint, and examine the journals to ascertain the facts of passage. See 50 Am. Jur. Statutes, Sec. 84, supra. For example, in *Illinois v. Illinois Cent. R. Co.* (1888), 33 F. 730, 762, is the following quotation from *Spangler v. Jacoby*, 14 Ill. 297:

> "It certainly was not the intention of the framers of the constitution that the signatures of the speakers and executive should furnish conclusive evidence of the passage of a law. The presumption, indeed, is that an Act thus verified became a law pursuant to the requirements of the constitution; but that presumption may be overthrown. If the journal is lost or destroyed, this presumption will sustain the law, for it will be contended that the proper entry was made in the journal; but when the journal is in existence, and it fails to show that the Act was passed in the mode prescribed by the constitution, the presumption is overcome, and the Act must fall."

It may be appropriate to preclude judicial relief where the legislature violates rules of its own creation, adopted for its own convenience for the purpose of regulating the passage of laws. *United States v. Ballin*, supra, 144 U. S. 1. It may also be appropriate to preclude judicial relief where the legislature is supreme and there is no written constitution as in England. But it is palpably arbitrary to preclude judicial relief where the legislative body has transcended the constitutional limits of its power. To presume a law was constitutionally passed, when it was not in fact so passed, denies the people a fair opportunity to redress a fundamental wrong.

It is submitted that judicial fiat "may not take place of fact in the . . . determination of issues involving life,

liberty or property." *Western & Atlantic Railroad Co. v. Henderson* (1929), 279 U. S. 639; *Manley v. Georgia* (1928), 279 U. S. 1; *Bailey v. Alabama* (1911), 219 U. S. 219. The presumption of constitutional passage of a law, when such law was passed contrary to an explicit constitutional limitation, is a denial of due process of law, 14th Amendment, as urged in question 1 of this appeal.

III.

An arbitrary classification in a taxation statute is a denial of the equal protection of the laws and this Court is not bound by a state court finding that such classification is reasonable.

Sec. 4(b)(1) of the Act exempts "Sales to farmers and other persons occupationally engaged in the business of producing food . . ." from application of the sales tax levied by the Act (Jurisdictional Statement. App. D, p. xxxix). Such exemption extends to all ". . . tangible personal property to be used for such production. . . ." (Jurisdictional Statement, App. D, p. xxxix.)

It is true, as urged by Appellees (Motion, p. 6), that a state may adopt reasonable classifications of business and occupations for purposes of taxation. But it is equally true, as stated in *Allied Stores of Ohio v. Bowers* (1959), 358 U. S. 522, 527, cited by Appellees (Motion, pps. 6, 7), that:

> ". . . there is a point beyond which the State cannot go without violating the Equal Protection Clause. The State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. The rule often has been stated to be that the classification must rest upon some ground of difference having a fair and substantial relation to the object of the legislation."

See also the following cases, cited at p. 18, Jurisdictional Statement:

Quaker City Cab Co. v. Pennsylvania (1928), 277 U. S. 389;

Louisville Gas & Electric Co. v. Coleman (1928), 277 U. S. 32;

Colgate v. Harvey (1935), 296 U. S. 405.

It is also true that the Supreme Court of Indiana expressly interpreted Sec. 4(b)(1) as exempting wholesale sales only; as pointed out by Appellees (Motion, p. 7). But it is not true that this Court is bound by the construction given the section by the Supreme Court of Indiana (Motion, p. 8) for all purposes. For the purpose of determining whether the state statute assailed violates the Federal Constitution, "a characterization of the tax by the state court is not binding here." *Quaker City Cab Co. v. Pennsylvania*, supra, 277 U. S. 389, 401; *Louisville Gas & E. Co. v. Coleman*, supra, 277 U. S. 32, 38.

The question remains whether the classification set up by Sec. 4(b)(1) is reasonable and rests upon some ground of difference having a fair and substantial relation to the [redacted] of the legislation.

The object of the Act is to impose a sales tax upon "transactions of retail merchants constituting selling at retail." (Act, Sec. 1; Jurisdictional Statement, App. D, p. xxxiv.) Since the sales tax "shall be paid by the purchaser to the retail merchant. . . ." (Act, Sec. 1; Jurisdictional Statement, App. D, p. xxxiv), it is clear that the purchaser is the party taxed in the transaction.

It is said:

> "It is doubtful that Section 4 (b) (1) was even necessary to prevent imposition of the tax upon the transactions described since that section simply establishes that the sale of certain enumerated products to farmers and others similarly occupationally engaged for use in the production of food and commodities for sale or further use does not constitute 'selling at retail' ". (Motion, p. 7).

If that is true, why did the legislature put such a cumbersome section in the Act? It is absurd to assume that the legislature drafted an unnecessary section.

More important, however, is the circuitous nature of Appellees' argument in the light of the practical impact of the exemption. If a salesman, for example, purchases an automobile at retail for use in his business, he must pay the tax. A farmer, on the other hand, purchasing a tractor at retail for use in his business, will not be taxed. In each case, the sale of the purchaser's business product will produce one of Appellees' so-called ultimate or true retail transactions—a "subsequent sale of food and commodities" which "will instead produce the taxable event" (Motion, p. 7).

If this reasoning is applied to all retail purchasers, under similar circumstances, the object of the legislation would be defeated. The fact is, if this Act is to produce any revenue at all, it must, as it does, arbitrarily select an event in this production circle upon which to levy the tax. That event is the retail sale.

No quantity of double talk can rationalize the fact that the farmer, when engaged in the taxable event, is exempt while other purchasers are not. This is class legislation at its worst.

Appellees' list of statutes, on pages 8-9 of their motion, merely illustrates the magnitude of this invidious type of discrimination. Moreover, Appellees have not shown that the classification has a reasonable object, such as "a statute which encourages the location within the State of needed and useful industries by exempting them, though not also others. . . ." *Allied Stores of Ohio v. Bowers*, supra, 358 U. S. 522, 528.

Thus, the exemption of certain retail sales to farmers is papably arbitrary and does involve a denial of equal protection of the laws to Appellants. Question 3 presents a substantial federal claim.

CONCLUSION

It is respectfully urged that Appellees' Motion to Dismiss be denied and that the Court permit briefs to be filed and oral argument to be heard on the substantial federal questions presented by this appeal.

Respectfully submitted,

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